APPENDIX I

No. 124-72

IN THE UNITED STATES COURT OF CLAIMS

WILLIAM GREEN CONSTRUCTION COMPANY, INC.
Huntington, New York

and

UNITED STATES FIDELITY & GUARANTY COMPANY, Calvert & Redwood Street, Baltimore, Maryland,

Plaintiffs

v.

THE UNITED STATES OF AMERICA

Defendant

Petition

Stanley C. Morris, Jr., Attorney of Record, 1250 Connecticut Avenue, N.W., Washington, D.C., attorney for plaintiffs.

James V. Dolan, Michael Malley, Steptoe & Johnson, 1250 Connecticut Avenue, N.W., Washington, D.C., of counsel.

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WILLIAM GREEN CONSTRUCTION COMPANY, INC.
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and

UNITED STATES FIDELITY & GUARANTY COMPANY, Calvert & Redwood Streets, Baltimore, Maryland,

Plaintiffs

v.

THE UNITED STATES OF AMERICA,

Defendant

PETITION

To the Honorable The Court of Claims:

1. This action arises under and jurisdiction is conferred by Title 28 U.S.C. § 1491.

2. Plaintiff William Green Construction Company, Inc., is a corporation organized and existing under the laws of the State of New York, with principal offices at Huntington, New York. At all times pertinent hereto, said plaintiff has been engaged in the general contracting and construction business and was duly licensed and authorized to do business in the District of Columbia and the other jurisdictions involved.

3. Plaintiff United States Fidelity & Guaranty Company is a corporation organized and existing under the laws of the State of Maryland with principal offices at Calvert and Redwood Streets, Baltimore, Maryland. At all times pertinent hereto, it was duly licensed and engaged in the business of executing and delivering surety bonds, including payment and performance bonds on federal and other

public construction contracts in the District of Columbia and elsewhere.

4. On or about November 25, 1964, William Green Construction Company, Inc., (hereinafter referred to as "Green") entered into a contract with the United States of America, through the General Services Administration, designated Contract No. GS-03B-14282, Project No. 49288, in the amount of $1,899,138.00, for the construction of Women's Residence Hall No. 7, Howard University, Washington, D.C.

5. At approximately the same time, Green entered into a contract with the United States of America, through the General Services Administration, designated as Contract No. GS-01-B-PCC-0234, in the approximate amount of $2,340,583.50, for the construction of the United States Post Office and Federal Office Building, Portsmith, New Hampshire.

6. On or about June 9, 1966, Green entered into a contract with the United States of America, through the General Services Administration designated as Contract No. GS-03B-14603, for the construction of the National Training School for Boys, U.S. Department of Justice, Bureau of Prisons, Morgantown, West Virginia.

7. At the times material hereto Green also had and was in the process of performing the following other contracts:

(a) Dutchess County Office Building, Poughkeepsie, New York ($1,904,698.96)

(b) Earth Science Building, Penn State, Pennsylvania ($1,868,075.37)

(c) Ossining High School, Ossining, New York ($2,207,521.73)

8. Pursuant to the requirement of the contracts and the law, Green, as principal, and United States Fidelity & Guaranty Company (hereinafter referred to as USF&G),

as surety, executed and delivered to the United States, as obligee, payment and performance bonds, guaranteeing satisfactory completion of the contract work and payment of all persons supplying labor and materials thereunder, for the above-mentioned contracts for the construction of Women's Dormitory No. 7, Howard University and the United States Post Office and Federal Office Building, Portsmith, New Hampshire. A similar payment and performance bond was executed by Green, as principal, and by another surety company, as surety, for the construction of the National Training School for Boys, Morgantown, West Virginia.

9. In the latter part of 1965 and the early part of 1966 a dispute arose over the cast-in-place architectural concrete (CPAC) work for the Women's Dormitory No. 7, Howard University contract. Green advised Defendant that the contract specifications for the CPAC work, as they were being interpreted and applied by Defendant and its architect, were defective and a practical impossibility to perform. The Defendant disagreed and by letter of April 14, 1966, Defendant, acting through its contracting officer, advised Green that its right to proceed with the contract for Women's Residence Hall No. 7, Howard University, was thereby terminated for default on grounds that Green allegedly had failed to proceed in accordance with that contract.

10. Defendant's termination of Green's right to proceed with the Howard University contract was improper and illegal and constituted a breach of that contract. A timely appeal from the decision of Defendant's contracting officer to terminate the contract was duly filed by Green with the General Services Administration Board of Contract Appeals.

11. Defendant's letter of April 14, 1966, terminating Green's right to proceed with the Howard University contract advised Green that it and its surety would be

held "liable for any increased costs and for liquidated damages at the rate of Two Hundred and Forty Dollars ($240.00) per calendar day until such reasonable time as may be required to complete the work." Defendant's letter further advised that the contract was then "only 13.5% complete" and that "the contract completion date is April 23, 1966." This meant that as of April 24, 1966, Defendant would charge Green with the liquidated damage assessment of $240.00 per day.

12. Following the aforesaid notice of default a series of conferences and meetings were held between representatives of Defendant, Green and USF&G during which Defendant was advised by representatives of Green and USF&G that (a) the termination of Green's Howard University contract was improper; (b) the cost of completing that contract, if it were to be relet to another contractor, would substantially exceed the undisbursed balance remaining under that contract; (c) if Defendant were to set off the liquidated damages and any excess completion costs under the Howard University contract against Green's other two contracts with Defendant, i.e., the Post Office and Federal Office Building, Portsmith, New Hampshire, and the National Training School for Boys, Morgantown, West Virginia contracts, as Defendant had indicated it would do, it would make it financially impossible for Green to proceed with completion of those contracts; and (d) the inevitable result of any such set-off would be the termination of Green's other two federal contracts which, in turn, would force Green completely out of business, because the set-offs would either effectively eliminate or materially diminish future progress payments under those contracts and greatly impair or destroy its credit with suppliers of materials and sources of loans from banks. Green did not have the capital resources to continue performing contracts of that magnitude without the unimpaired benefit of progress payments.

13. In light of the above facts, representatives of Green and USF&G requested Defendant to isolate the Howard University dispute and agree not to set-off any liquidated damage or excess-completion-cost claims arising out of that contract against the other two contracts between Green and Defendant. Green was willing and able to complete satisfactorily those other two federal contracts, if the Government would agree not to set-off its Howard University claim against the proceeds earned by Green while completing the contracts not in dispute.

14. An agreement not to set-off would not have prejudiced Defendant, since any claims which it might have under the Howard University contract were secured to the extent of $1,899,138.00 by USF&G's performance bond. Performance of Green's other two federal contracts was similarly secured by the payment and performance bonds for those contracts.

15. On April 28, 1966, Green wrote Defendant, through its Commissioner of Public Building Services, General Service Administration (Hon. Casper F. Hegner), stating as follows:

> Re: Women's Residence Hall No. 7—Howard University, Washington, D.C.
> Portsmouth Post Office & Federal Office Building, Portsmouth, New Hampshire
> National Training School for Boys, Morgantown, West Virginia
>
> Dear Sir:
>
> In accordance with conference held at the offices of the General Services Administration of April 27, 1966, in Washington, D.C., concerning the above projects, we are transmitting this letter to clarify our position concerning same.

This letter is being forwarded at your request and to set forth in some detail, certain proposals made by the parties at the above mentioned meeting.

The contractor, William Green Construction Co., Inc. agrees that it will continue performance pursuant to contract on the Post Office and Federal Office Building in Portsmouth, New Hampshire and the National Training School for Boys in Morgantown, West Virginia. This declaration of intention is given in view of previous discussions between our representatives and representatives of the G.S.A. and the United States Fidelity & Guaranty Company with particular reference to an unresolved claim for damages, submitted by the contractor in reference to the Howard University Dormitory contract.

The commitment is made on the condition that the G.S.A. agrees not to assert or set off any claims against the contractor which it may have or accrue in the future, not including claims or back charges on the Portsmouth or West Virginia projects, against monies earned or to become due on the West Virginia or Portsmouth projects.

Very truly yours,

WILLIAM GREEN, *Pres.*
Green Construction Co., Inc.

16. On May 3, 1966, USF&G, through its counsel wrote Defendant, through its Commissioner, Public Buildings Services, General Services Administration (Hon. Casper F. Hegner), stating:

Re: William Green Construction Co., Inc.
Project No. 49288
Women's Residence Hall No. 7
Howard University, Washington, D.C.

Dear Mr. Hegner:

On Wednesday, April 27, representatives from William Green Construction Company and USF&G, which is surety on two contracts of the Green Company with the Government, met with members of your staff. USF&G had asked for the meeting to learn the details of the controversy between the Green Company and the Government concerning Project No. 49288, involving construction of Women's Residence Hall No. 7, Howard University, Washington, D.C., which contract USF&G had bonded.

The Green Company has two other contracts with the Government. They are Portsmouth Post Office and Federal Office Building, Portsmouth, New Hampshire, which is also bonded by the USF&G, and National Training School for Boys, Morgantown, West Virginia, which is bonded by another surety.[1] We are advised by the Green Company that it intends to complete those contracts and we understand from the Government that it wishes to have them completed as expeditiously as possible.

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[1] The other surety company was not represented at the meeting on Wednesday. It should be understood that the interest of USF&G at that meeting and in this letter is confined solely to the contracts bonded by USF&G.

The controversy between the Green Company and the Government with regard to Howard University involves disputed issues of fact and the question of liability may not be determined for some time. However, if the Government off-sets its claims arising out of the Howard University contract against funds earned by the Green Company on other contracts, the Green Company will be unable to proceed with work on the contracts not in dispute for lack of funds to pay laborers and material-men.

It is apparent that if the contracts of the Green Company not in dispute are to be completed as the Government wishes, the controversy with respect to Howard University must be isolated and treated separately from the other contracts. Accordingly, we ask whether the Government will agree to confine off-sets of claims, past and prospective, to the respective contract of the Green Company out of which it arises—e.g. all claims with respect to Howard University will be confined to that contract—so that the Green Company may proceed with assurance that funds from contracts not in dispute, including retentions, will be available to pay for labor and materials incurred in the prosecution of the work.

Very truly yours,

/s/ Stanley C. Morris, Jr.
Local Counsel for UF&G

Copies of this letter were sent to the Contracting Officer and the other General Services Administration officials involved.

17. In view of the extremely serious consequences which would inevitably flow from Defendant's termination of Green's Howard University contract and a set-off of claims arising out of that termination against other Green con-

tracts, Defendant was requested by petitioner to withdraw its termination notice and to modify the Howard University contract specifications or its interpretation thereof to eliminate the elements of impossibility. This request was denied by Defendant.

18. By letter of May 12, 1966, Defendant, through its Commissioner, Public Building Service, General Services Administration (Hon. Casper F. Hegner), refused Plaintiff's request that the Howard University contract dispute be isolated from, and without set-offs against, Green's other contracts with Defendant. That letter stated in part as follows:

> "You request that we confine our right of set-off arising out of the defaulted Howard University contract solely to that contract although we have the right to set-off any claim against money due under any contract which Green has with the Government.
>
> "Needless to say we desire all GSA projects which Green has under contract to be completed expeditiously. We cannot, however, agree to waive any right of the Government in the absence of adequate consideration. You appreciate, of course, that no such consideration is included in your proposal."

19. Defendant's action in issuing its notice of default termination of Green's Howard University contract, in refusing to withdraw that notice and modify the contract requirements to make them possible to perform and in refusing to isolate the Howard University contract dispute from Green's other federal contracts was taken with actual knowledge that the proximate, inevitable and natural consequences of such action was (1) to make it impossible for Green to continue with performance of Post Office and Federal Office Building, Portsmouth, New Hampshire, and National Training School for Boys, Morgantown, West Virginia, contracts; and (2) by reason of the termination of those federal contracts, to force Green out of business, causing total loss of its net worth.

20. As a result of Defendant's action, it, in fact, became financially impossible for Green to continue with performance of its other two contracts with Defendant. Accordingly, on or about May 18, 1966, Green was forced to advise Defendant that because of the impending set-off of claims arising out of the Howard University dispute it was financially unable to proceed with performance of the contracts for the construction of the United States Post Office and Federal Office Building, Portsmouth, New Hampshire, and the National Training School for Boys, Morgantown, West Virginia. In light of this fact, Green's right to proceed with those latter two contracts was terminated.

21. As a direct result of the forced termination of Green's contract with Defendant for the Post Office and Federal Office Building at Portsmouth, New Hampshire, USF&G, as surety for that contract, was required to complete performance of that contract and to pay all valid and outstanding claims for labor and materials supplied in connection therewith prior to the date of termination. USF&G incurred costs and losses in this respect to the total amount of $870,969.59. Under its indemnity agreement and a judgment of the Supreme Court of New York, Green is liable to USF&G for the full amount of that loss.

22. As a direct, natural and foreseeable result of the Defendant's termination of the Howard University contract and the resulting termination of its other two contracts with Defendant, Green was deprived of the cash flow necessary to continue its business, its credit was destroyed and it was, accordingly, forced to discontinue its business as a general contractor. This resulted in a complete loss of the net worth of said company.

23. As a direct, foreseeable and inevitable result of the foregoing, Green was unable to complete its contracts for the construction of the Dutchess County Office Building, the Penn State University Earth Science Building and the Ossining High School. As a result of Green's inability to

complete those contracts, USF&G, as surety for those contracts, was required to complete performance thereof and to pay all valid and outstanding claims for labor and materials supplied thereunder. USF&G incurred costs and losses in this respect in the total amount of $948,753.44. Under its indemnity agreement and the judgment of the Supreme Court of New York, Green is liable to USF&G for the full amount of that loss.

24. As a further direct foreseeable and inevitable result of Defendant's action, as described above, and specifically as a result of Green's inability to continue in business and its losses under the above contracts, Green lost the full value of its business which as of April 30, 1964, had a net worth of $890,334.26.

25. Green's appeal to the General Services Administration Board of Contract Appeals from Defendant's wrongful default termination of its Howard University contract was perfected and duly docketed with the Board under Docket No. 2114. Appeal proceedings were temporarily continued pending reletting and completion of the Howard University contract by another contractor to determine whether those contract plans and specifications, as interpreted by Defendant, were, in fact, impossible of performance. The appeal proceeding culminated in a stipulation executed by Defendant and filed with the Board on October 8, 1971, which conceded, *inter alia*,

> "1. That the Contractor was not in default at the time it received notice of the termination and the Government concedes the termination for default was erroneously made by the contracting officer. The appeal, therefore, should be granted as defined by the prior decisions of the Board in this case."

Upon the basis of this stipulation, the Board on October 13, 1971, entered an order, granting the appeal and setting

aside the default termination for Green's Howard University contract, stating as follows:

> The Board treats the Stipulation, in part, as the Government's admission that the contractor was not in default, within the meaning of the Default clause of the contract, at the time the contract was terminated for default. Accordingly, the Board finds that the Appellant's right to proceed under the contract was improperly terminated for default.

26. The Board's order of October 13, 1971, remanded the case to the Contracting Officer for "equitable adjustment to compensate for such termination." However, pursuant to the Defendant's stipulation, it was understood and agreed:

> "4. That any equitable adjustment under the contract shall not be prejudicial to appellant's right to proceed in the Court of Claims for additional damages not the subject of such equitable adjustment."

27. As established by the Government's stipulation and the above-mentioned order of the General Services Administration Board of Contract Appeals, Defendant's default termination of Green's Howard University contract, coupled with Defendant's threat to set off claims based on that termination against Green's other contracts, constituted a breach by Defendant of Green's Howard University contract. As a natural, inevitable and foreseeable result of that breach, Green and USF&G, as its surety, sustained damages, which it is entitled to recover from Defendant, in the total amount of $2,710,057.29, computed as follows:

(a) Losses under United States Post Office and Federal Office Building Contract, Portsmouth, New Hampshire	$ 870,969.59
(b) Losses under other Green Contracts	$ 948,753.44
(c) Loss of value of Green's business	$ 890,334.26
TOTAL	$2,710,057.29

Green and USF&G also sustained substantial losses under the Howard University contract proper for which it is entitled to compensation. However, those losses are the subject of the pending equitable adjustment proceedings being conducted pursuant to the remand directed in the Order of the General Services Administration Board of Contract Appeals. Accordingly, those losses are severable from those claimed herein and are not involved in this suit at this time.

28. By virtue of its subrogation rights, as surety, arising out of its payments under its payment and performance bonds, and by virtue of the judgment obtained by it against Green in the Supreme Court of the State of New York, USF&G is subrogated to Green's rights of recovery against Defendant for the above losses and damages.

29. Other than the above-mentioned action before the General Services Administration Board of Contract Appeals, no other action has been had on the claim asserted herein by Congress or by any other Department of the United States Government. No persons other than Plaintiffs, Green's subcontractors and materialmen are owners of or have any interest in the claims asserted herein. Subject to the subrogation and other rights of the surety as set forth above, no assignment or transfer of this claim or any part thereof or interest therein has been made. Plaintiff's are justly entitled to the amount claimed herein from the United States, after allowing all just credits and off sets. Plaintiffs have at all times borne true allegiance for the Government of the United States and have not in any way voluntarily aided, abetted or given encouragement to rebellion against said Government.

Wherefore under Count I of this Petition, Plaintiffs demand judgment in the amount of $2,710,057.29, together with interest from May 12, 1966, plus costs and disbursements in this action, and for such other remedies as to this Court seem appropriate.

Count II

30. Under Count II of this Petition Plaintiffs repeat and reallege by reference each and every allegation set forth in paragraphs 1 through 29 above, as if fully restated herein.

31. Defendant's refusal on or about May 12, 1966, to isolate its dispute with Plaintiffs over the Howard University contract from Green's contracts with Defendant for the Post Office and Federal Office Building (Portsmouth, New Hampshire) and the National Training School for Boys (Morgantown, West Virginia) and its threat to set off against those latter two contracts any liquidated damage or excess completion cost claims under the Howard contract was, in effect, a threat not to make any further progress payments to Green for future work under the Post Office and Federal Office Building and the National Training School for Boys contracts. As such, Defendant's conduct constituted an anticipatory breach of Green's contracts for the Post Office and Federal Office Building and the National Training School for Boys.

32. As the natural, foreseeable and proximate result of Defendant's anticipatory breach of those contracts, Plaintiffs' sustained losses and damages under that contract and the other Green contracts bonded by USF&G in the amount of $1,819,723.03, as set forth in paragraphs 21-24 above.

33. As a further natural, foreseeable and proximate result of Defendant's anticipatory breach of those contracts, Green was forced to discontinue its general contracting business, resulting in additional loss and damages in the amount of $890,334.26.

34. As a result of Defendant's anticipatory breach of the United States Post Office and Federal Office Building contract and the National Training School for Boys contract, Plaintiffs are justly entitled to recover from De-

fendant in the total amount of $2,710,057.29, after allowing all just credits and off sets.

Wherefore under Count II of this petition, Plaintiffs demand judgment in the amount of $2,710,057.29, with interest thereon from May 12, 1966, plus costs and disbursements in this action, and/or such other relief as tc this Court may seem appropriate.

Respectfully submitted

/s/ Stanley C. Morris, Jr.
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APPENDIX II

IN THE UNITED STATES COURT OF CLAIMS

No. 124-72

(Decided May 11, 1973)

WILLIAM GREEN CONSTRUCTION COMPANY, INC. AND UNITED STATES FIDELITY & GUARANTY COMPANY v. THE UNITED STATES

James V. Dolan, for plaintiff; *Stanley C. Morris, Jr.*, attorney of record. *Richard A. Behrens, Michael Malley* and *Steptoe & Johnson*, of counsel.

Judith Ann Yannello, with whom was *Assistant Attorney General Harlington Wood, Jr.*, for defendant.

Before COWEN, *Chief Judge*, DAVIS, SKELTON, NICHOLS, KASHIWA, KUNZIG, and BENNETT, *Judges*.

On Defendant's Motion To Dismiss The Petition

DAVIS, *Judge*, delivered the opinion of the court:

Three separate government construction contracts are interlaced in this case. In November 1964 plaintiff William Green Construction Company (Green) agreed with the General Services Administration to build a women's residence hall at Howard University in the District of Columbia (the Howard University contract). About the same time Green also contracted with GSA to construct a Post Office and Federal Office Building in Portsmouth, New Hampshire (the FOB contract). A year and one-half later, the same agency arranged with plaintiff Green to erect the National Training School for Boys in Morgantown, West Virginia (Training School contract). Plaintiff United States Fidelity & Guaranty Company (USF&G) was the surety on the Howard University and FOB contracts; another company was surety on the Training School agreement. Green was also working, during this period, on three nonfederal projects on which USF&G was surety.

In 1965-1966, during performance of the Howard University work, the contractor and the defendant had a serious dispute whether certain of the government specifications were defective and impossible to carry out. When Green refused on that ground to go forward, the contracting officer terminated for default. Green challenged this determination, insisting that its inability to proceed was justified by the defects in the defendant's requirements.

In the discussions which followed, defendant indicated that it intended to set off, against amounts which would be owing on the other two of Green's federal contracts, the liquidated damages and excess completion costs assessable with respect to the just-terminated Howard University agreement. Green responded that such set-offs were improper—because the default-termination was unwarranted—and would make it financially impossible to proceed with completion of the other two contracts, and, more than that, the contractor's entire business would be destroyed. For this reason, Green and USF&G asked the GSA to isolate the Howard University dispute and not to impose set-offs, but the Government refused to make such a commitment.

Shortly after the Government had made it clear that it fully maintained its right of set-off, but before any set-off had actually occurred, Green informed GSA that, because of the threat to reduce payments on the other projects, it was financially unable to, and would not, proceed with the FOB and Training School contracts. These two agreements were then terminated by the Government for default. USF&G completed the FOB work, and apparently the other surety did the same for the Training School contract. Green likewise failed to complete the three nonfederal contracts it had, and went out of business.

Green appealed to the General Services Board of Contract Appeals from the default-termination of the Howard University contract, but it never sought review by the

Board of the defaults with respect to FOB and Training School. The Howard appeal asked, not only for the conventional modern adjustment for an improper default-termination,[1] but also for damages for losses on FOB and Training School, as well as on the nonfederal projects, and for loss of Green's business as a whole. Because of the inclusion of these items of recovery, the Government moved the board to dismiss the appeal as for "breach of contract" and "unliquidated damages", beyond the board's authority. In 1968 the board partially granted this motion, dismissing all claims except that for an equitable adjustment under convenience-termination standards.

Later, in 1971, the parties stipulated before the board that Green "was not in default at the time it received notice of the termination [of the Howard University contract] and the Government concedes the termination for default was erroneously made by the contracting officer. The appeal, therefore, should be granted as defined by the prior decisions of the Board in this case." The GSBCA then found that the contractor's "right to proceed under the contract was improperly terminated for default", and remanded to the contracting officer to determine the equitable adjustment for the unreimbursed costs of performing the Howard work. The stipulation expressly provided that "any equitable adjustment under the contract shall not be prejudicial to [the contractor's] right to proceed in the Court of Claims for additional damages not the subject of such equitable adjustment." GSBCA No. 2114, 71-2 BCA ¶ 9116.

In 1972 Green and USF&G brought this action, alleging what we have thus far set forth, asking for the large damages (over $2,700,000) the board had dismissed from the

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[1] The Howard contract provided that, if the default-termination was erroneous, the contractor would be entitled to an equitable adjustment—the equivalent to treatment as a convenience-termination. *See infra.*

Howard appeal, and claiming that those damages are recoverable on the theory that the United States breached all three of Green's federal contracts. Count I of the petition asserts the full claim as a breach of the Howard contract, while Count II bottoms the very same claim on alleged breach of the FOB and Training School agreements. Defendant has moved to dismiss the petition for failing to state any proper claim.

We think that the claimants do not have a "breach" claim against defendant on any of the three contracts, but that plaintiff Green does have a right to a convenience-termination type of equitable adjustment, under all three of them, and that such adjustments should be awarded administratively. We discuss the three agreements *seriatim*.

Howard University contract (Count I): The defendant's notice of default-termination of the Howard contract triggered the default-termination clause which provided that, if it was determined for any reason "that the Contractor was not in default under the provisions of this clause", or that "the delay was excusable", the matter was to be treated as a convenience-termination if the contract contained a convenience-termination article, and, if not, the contract was to "be equitably adjusted to compensate for such termination." We have held that the latter alternative calls for the general equivalent of a convenience-termination award. *General Builders Supply Co.* v. *United States*, 187 Ct. Cl. 477, 409 F.2d 246 (1969).

It follows that when the GSBCA determined that Green's right to proceed was wrongfully ended, and remanded for an appropriate adjustment, the contractor received the maximum to which it was entitled under the contract. There is no present complaint as to the amount of the equitable adjustment, and plaintiffs do not contend that such an award can or should cover the types of consequential damage they seek here. The petition suggests, however, that a

breach claim for a wrongful default-termination somehow survived for these additional items of recovery.

But it is very plain under our decisions that the administrative remedy is the only one available to the contractor. Green does not retain a "breach" claim, for an improper default, which can be brought in court and through which a supplemental award can be obtained. *See General Builders Supply Co., supra,* 187 Ct. Cl. at 480 n.3, 409 F. 2d at 248 n.3; *G. C. Casebolt Co.* v. *United States,* 190 Ct. Cl. 783, 786-87, 421 F. 2d 710, 712 (1970). The exclusive remedy "under the contract" substitutes for the "breach" claim which would otherwise exist, and becomes the claimant's sole form of relief. The measure of recovery for a convenience-termination—costs incurred, plus a reasonable profit on work performed—is an adequate replacement for the common-law cause of action. *See infra.*

It is worth noting, in addition, that in any event the type of consequential damage for which plaintiffs now press could not be obtained under Count I even if there were no such default-termination clause in the contract and this suit were properly one for common-law breach for wrongful cancellation of the Howard University pact. On the face of the petition it was not the wrongful termination itself which caused either Green's inability to proceed on the other two federal contracts, or the stoppage of work on the three nonfederal projects, or plaintiff's eventual going-out-of-business, but the subsequent and separate threat of set-offs against payments owing on the FOB and Training School projects. Whatever else those threats may have been, they were in no way violations of the Howard contract, nor were they directly or integrally linked to the Howard default termination. They were, instead, independent acts of the Government directed to the other two federal projects.

Accordingly, defendant is quite right that Count I fails to state any claim at all and must be dismissed *in toto.* The

equitable adjustment which Green is receiving, through the administrative proceedings, is all that it merits with respect to the Howard contract.

FOB contract (Count II): A. Even if the default-termination of the FOB agreement was invalid, Green should have appealed to the GSBCA, just as it sought review of the Howard termination. That was the channel expressly marked out by the contract and it should have been followed. If the FOB termination was improper, an equitable adjustment would be made under that contract which embodied the same default-termination form as the Howard agreement.

Plaintiffs try to avoid this conclusion by a number of arguments which we must reject. The first is that the claim in Count II is not for wrongful termination but for anticipatory breach of the FOB contract, through refusal to make progress payments. This is but a choice of phrasing to camouflage the irrefutable fact that the only detriment which came, or could come, to plaintiffs would be through a wrongful default-termination. Neither claimant suffered harm from the mere threat to withhold payment; neither would have suffered the harm charged from an actual withholding, if that is all there were. The injury could only come if the Government insisted that plaintiffs continued to have obligations under the FOB contract. If, for instance, the GSA had acquiesced (after the set-off threat) in Green's abandonment of the FOB project, the denial of progress payments would not interfere with performance because there would be no further work to be done or paid for. A failure to issue a default-termination would amount to an acquiescence in abandonment. *Cf. Ling-Temco-Vought, Inc.* v. *United States,* 201 Ct. Cl. —— (Mar. 1973). Thus, it was only the defendant's insistence, via the default-termination notice, that plaintiffs continued to have obligations under the FOB contract which precipitated any of the harms alleged. That was the heart of the matter.

As in *Allied Paint Mfg. Co.* v. *United States*, 200 Ct. Cl. ——, 470 F. 2d 556 (Dec. 1972), the contractor could have attacked the termination, through an appeal to the GSBCA, on the ground that other acts of the Government (*i.e.*, the threats of set-off) excused Green's failure to proceed.[2] Another comparable case is *Nolan Bros., Inc.* v. *United States*, 186 Ct. Cl. 602, 405 F. 2d 1250 (1969), in which we held that a convenience-termination subsumed and obviated an independent breach claim for defective design. We pointed out, in words directly applicable to the present case, "If the Government, as it might have done, had terminated the contract for default because plaintiff lagged (on account of the defective specifications) and the default was found excusable (as due to the defendant's own fault), the termination would be converted, under the default clause, into a convenience-termination * * *", with the plaintiff recovering costs incurred plus a measure of profit, but not unearned profits. 186 Ct. Cl. at 607, 609–10, 405 F. 2d at 1253, 1255. Plaintiff's so-called "breach" claim has, in short, no viability independent of the validity of the default-termination, and that could be readily challenged through the "disputes" procedure.[3]

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[2] In *Allied Paint Co.*, as here, the contractor's position was that the default-termination was improper because wrongful acts of the GSA in the administration of other contracts adversely affected the claimant's ability to perform all of its contracts, including those terminated.

[3] Plaintiffs complain that in order to obtain relief from the FOB and Training School defaults, they would have to show that the Howard default was improper—and "only under the Howard University contract could Green obtain the threshold determination (setting aside the Howard default) which was essential to obtaining any relief" under the other two agreements. But there was nothing to prevent Green from asking the GSBCA to suspend proceedings in the FOB and Training School cases to await the Howard determination. That is a very common practice where a significant issue in one matter depends upon the resolution of another case.

A second of claimant's positions is that the entire termination-and-disputes remedy was aborted before the default notice. In *Nolan Bros., Inc., supra,* 186 Ct. Cl. at 609 n. 5, 405 F. 2d at 1255 n. 5, we set apart "a case in which the contractor treats a government breach of warranty as ending the entire contractual relationship before the defendant attempts to exercise its right of termination." Plaintiffs say that that is what happened here—that the whole contract was effectively ended before the default-termination—but their current stance is conclusively refuted by the significant fact that USF&G undertook to complete the FOB project after the termination. If the contract was not subsisting at that time, neither Green nor USF&G would have been under any obligation; the existence of the contract was the essential predicate for the surety's agreement to complete. As in *Nolan,* we cannot see the plaintiffs had put an end to, or thought that they had put an end to, the contract before the Government invoked the default clause.

The third point is that the set-off threats constituted a cardinal change, by effectively deleting the progress payment provisions of the FOB contract, and that a cardinal change is redressable only in court, not administratively. *See Edward R. Marden Corp.* v. *United States,* 194 Ct. Cl. 799, 442 F. 2d 364 (1971). We do not agree that it is a contract change of any kind—cardinal or ordinary—for the Government to set-off against progress payments (let alone merely threatening to set-off) a federal claim on another contract (with the same contractor) which is believed in good faith, but mistakenly, to be valid. This is simply an exercise of the established right of set-off (*see United States* v. *Munsey Trust Co.,* 332 U.S. 234 (1947); *Burlington Northern Inc.* v. *United States,* 199 Ct. Cl. , 462 F. 2d 526 (July 1972)), which is not transformed into something else because the defendant's claim turns out later to be without merit.

In any event, and assuming for argument's sake that the threats of set-off did equal a cardinal change excising the progress-payment provisions, it does not follow that such a "breach" claim would be any different from the "breach" claim in this case for simple violation of the progress-payments clause. As we have pointed out, that claim is swallowed up by the default-termination which was the event causing plaintiffs' detriment. Violation of the payments article, or even its deletion, would not have brought about the chain-of-events asserted by Green and USF&G if it were not for the default-termination. From claimants' viewpoint that was the real villain in the drama, whom they should have pursued on his own scene.

Lastly, we are told that an equitable adjustment of the convenience-termination type does not give full enough relief for the injuries suffered, and therefore plaintiffs should be allowed to seek, through this court, the part of the remedy which the administrative award cannot give them. The answer is that the premise is incorrect. "The only substantial difference between the sum calculated under" equitable adjustment or convenience-termination standards "and the amount recoverable in a common law action for contract breach is the non-inclusion in the former of anticipated but unearned profits." *Nolan Bros., Inc.* v. *United States, supra,* 186 Ct. Cl. at 607, 405 F. 2d at 1253. This exclusion from relief of unearned profits is a settled policy which has long been accepted and enforced. 186 Ct. Cl. at 608-09, 405 F. 2d at 1254-55; *General Builders Supply Co.* v. *United States, supra,* 187 Ct. Cl. at 485–86, 409 F. 2d at 251; *G. C. Casebolt Co.* v. *United States, supra,* 190 Ct. Cl. at 788, 421 F. 2d at 713. And even in a common-law suit there would be no recovery for general loss of business, the claimed loss of the entire Green net worth, and losses on the non-federal work—such damages are all deemed too remote and consequential. *See Ramsey* v. *United States,* 121 Ct. Cl. 426, 433-35, 101 F. Supp. 353 357–58 (1951), *cert. denied,* 343 U.S. 977 (1952); *Dale*

Constr. Co. v. *United States,* 168 Ct. Cl. 692, 738 (1964); *Specialty Assembly & Packing Co.* v. *United States,* 174 Ct. Cl. 153, 175, 355 F. 2d 554, 567–68 (1966). The conclusion must be that the administrative remedy is, as we have already said, a full and permissible substitute for the award of damages under the former "breach" claim.

Plaintiffs err therefore in seeing themselves as under no duty to proceed administratively. On the contrary, Green should have appealed from the default-termination of the FOB contract and obtained its relief in that fashion.

B. Not unexpectedly, the defendant suggests that, having failed to appeal, Green is now barred forever. We follow, instead, the rule of *Zidell Explorations, Inc.* v. *United States,* 192 Ct. Cl. 331, 335–36, 427 F. 2d 735, 737–38 (1970), that, if the circumstances warrant, we will give a contractor who has failed to appeal a second chance. The time-limit for appeals to contract appeals boards is not beyond enlargement (*Maney Aircraft Parts, Inc.* v. *United States,* 197 Ct. Cl. 159, 453 F. 2d 1260 (1972); *Monroe M. Tapper & Associates* v. *United States,* 198 Ct. Cl. , 458 F. 2d 66 (April 1972)), and the Act of August 29, 1972, Pub. L. No. 92–415, 86 Stat. 652, gives us power to remand to a board "with such direction as it [the court] may deem proper and just."

To our mind this is a case, like *Zidell,* in which we should not rigidly hold the contractor to its original decision not to appeal. The three federal contracts were linked in plaintiff's mind and it may have considered the enlarged recovery it originally sought in the Howard administrative proceedings to be a sufficient method of covering all three determinations.[4] Then, too, plaintiff may well have been misled by its view, still strenuously espoused here, that

[4] The FOB and Training School contracts were terminated in 1966. It was not until 1968 that the GSBCA dismissed, from the Howard appeal, the claims relating to the other two contracts. By that time the time for appealing the FOB and Training School defaults had long expired.

its claims are entirely "breach" claims for court trial. We referred in *Zidell* to the great confusion since *United States* v. *Carlo Bianchi & Co.*, 373 U.S. 709 (1963), over which cases properly fall "under the contract" and which are for "breach". This case is a prime exemplar. Especially since plaintiffs appear to have a valid right to substantial further relief, they should not be eternally punished for their initial mistaken choice of procedure.[5] The case should go to the GSBCA for processing under the default-termination clause of the FOB contract.

c. There has, as yet, been no decision that the termination of the FOB agreement was improper, but we think that on the undisputed facts there is no doubt that it was, and we now so hold as a matter of law since the board could not validly decide otherwise. All must now accept the Howard termination as incorrect; Green was not in default on that project and the default-termination was erroneously made by the contracting officer. There were, accordingly, no liquidated damages and no excess construction costs which could properly be offset against the FOB and Training School contracts. That threats to offset were nevertheless made is undisputed and indisputable. The connection is also clear between those threats and Green's stopping work on the FOB and Training School projects. Defendant does not even hint that this stoppage was unrelated to, or had some cause other than, the menace of set-off.[6] Nor is there any suggestion that plaintiffs are mistaken when they say they warned the defendant that

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[5] The cases in which we refused contractors a second choice—*Briscoe* v. *United States*, 194 Ct.Cl. 866, 887-88, 442 F.2d 953, 966 (1971); *Richardson Camera Co.* v. *United States*, 199 Ct.Cl. , 467 F.2d 491 (Oct. 1972)—presented very different facts and circumstances.

[6] The petition reproduces a letter from Green committing it to continue performance on the FOB and Training School contracts provided that GSA agreed not to offset claims unrelated to those two projects.

they would need the progress payments on the two contracts, without substantial diminution.[7] There is, moreover, not the slightest basis for thinking that Green should (or could) have gotten the necessary money from other sources.

It follows, we think, that Green's refusal to proceed on FOB must now be held to be excused. A serious threat in these circumstances to withhold necessary progress payments because of an erroneous off-set claim on another contract is an act of the Government, not attributable to the contractor, which excuses whatever technical default there may be. Construction contractors cannot be expected to continue working if the Government improperly holds back on substantial interim payments which enable the project to proceed. *Cf. Litchfield Mfg. Corp.* v. *United States,* 167 Ct. Cl. 604, 338 F. 2d 94 (1964); *Pigeon* v. *United States,* 27 Ct. Cl. 167, 175-76 (1892); *Overstreet* v. *United States,* 55 Ct. Cl. 154, 173–74 (1920).[8]

D. The equitable adjustment to which Green is entitled under the FOB contract includes, not only the costs it incurred itself before termination, but also USF&G's excess costs in completing the project. Defendant admits[9] that,

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[7] The petition sets forth a pre-termination letter from counsel for USF&G to GSA saying explicitly that "if the Government off-sets its claims arising out of the Howard University contract against funds earned by the Green Company on other contracts, the Green Company will be unable to proceed with work on the contracts not in dispute for lack of funds to pay laborers and materialmen."

[8] Green might have waited until a set-off was actually made, but the GSA's intention had been made very plain and there apparently was planning and preparation work to do which would be entirely wasted if plaintiffs were not going forward once a set-off was actually made. In the circumstances we do not think Green was compelled to await an actual set-off.

[9] See Defendant's Reply to Plaintiffs' Response In Opposition to Defendant's Motion to Dismiss, at 9 n.6.

when a default-termination is converted to a convenience-termination, the contractor is entitled to any liquidated damages and reprocurement costs paid following the termination. That would include, since the surety stands here in the contractor's place,[10] USF&G's unreimbursed excess completion costs, if appropriate and reasonable. *Cf. J. D. Hedin Constr. Co.* v. *United States*, 197 Ct. Cl. 782, 790–803, 456 F. 2d 1315, 1320–27 (1972). The equitable adjustment called for by the contract is flexible enough to cover that item, to the extent the contractor has incurred such costs as a result of the wrongful termination.

On the other hand, as we have already indicated, USF&G's costs of completing the three non-federal contracts, and the loss of Green's net worth, are not proper items for an equitable adjustment under the FOB and Training School contracts.

Training School contract (Count II): What we have said as to the FOB contract controls the Training School agreement. USF&G was not surety for that work and the petition therefore does not ask for recovery of amounts expended by the other surety (which is not a plaintiff here). But if the other surety has a claim, through Green, with respect to completion of FOB, the Training School equitable adjustment should take account of it if presented.

Defendant's motion to dismiss the petition is fully granted as to Count I, but as to Count II the court makes the following disposition: (a) the petition is dismissed to the extent that a claim for "breach" of the FOB and Training School contracts, triable in court, is stated; (b) the petition is construed as alternatively seeking equitable ad-

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[10] USF&G has paid all laborers and materialmen, and Green is liable to USF&G for the full amount of the loss suffered in completing the FOB contract.

justments under those two contracts;[11] and (c) the request for such equitable adjustment is remanded to the GSBCA under P.L. 92–415, this opinion, and General Order No. 3 of 1972, for appropriate administrative proceedings. Counsel for the plaintiffs is designated as the responsible reporting attorney under paragraph 9(a) of General Order No. 3.

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[11] Count II demands, in the alternative, "such other relief as the court may deem appropriate."

APPENDIX III

IN THE UNITED STATES COURT OF APPEALS

No. 124-72

WILLIAM GREEN CONSTRUCTION COMPANY, INC. AND UNITED STATES FIDELITY & GUARANTY COMPANY

v.

THE UNITED STATES

Before Cowen, *Chief Judge,* Davis, Skelton, Nichols, Kashiwa, Kunzig and Bennett, *Judges.*

Order

This case comes before the court on plaintiffs' motion, filed June 11, 1973, for a rehearing and partial reconsideration and on defendant's motion, filed June 18, 1973, for clarification, modification and reconsideration of the court's opinion issued May 11, 1973. Upon consideration thereof, together with the responses in opposition thereto, without oral argument.

It is ordered that the slip opinion entered herein on May 11, 1973, be and the same is amended and modified in that footnote 10 appearing on page 11 of the slip opinion is stricken and deleted and the following is inserted in lieu thereof:

> "[10] Plaintiffs allege, and the defendant has not denied, that USF&G has paid all laborers and materialmen. We proceed, at this stage, on that assumption. It is clear that Green is liable to USF&G for the full amount of the loss suffered in completing the FOB contract."

It is further ordered that, except for the above modification and amendment of the said slip opinion, no further modification or amendment is to be made and the plaintiffs' motion, filed June 11, 1973, and defendant's motion, filed June 18, 1973, be and the same are denied.

BY THE COURT

/s/ WILSON COWEN
Chief Judge